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May 16, 1996

VIA HAND DELIVERY

Mr. William A. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions In the Telecommunications Act of 1996; CC Docket No. 96-98.

Dear Mr. Caton:

Enclosed for filing in the above-referenced matter are copies of the Initial Comments of Municipal Utilities in response to the Commission's Notice of Proposed Rulemaking in the matter of Implementation of the Local Competition Provisions In the Telecommunications Act of 1996; CC Docket No. 96-98. These copies include: (a) the original and four (4) copies for the Secretary; and (b) five (5) additional copies for delivery to each Commissioner.

Any questions regarding this matter may be directed to the undersigned.

Sincerely,

James N. Horwood
Scott H. Strauss
Wendy S. Lader

Attorneys for MUNICIPAL UTILITIES

Enclosures

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In the Matter of IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC DOCKET NO. 96-98

INITIAL COMMENTS OF MUNICIPAL UTILITIES

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May 16, 1996

EXECUTIVE SUMMARY

"Municipal Utilities" is an unaffiliated group of municipalities and publicly-owned electric distribution utilities who have direct and varied interests in federal inter-connection requirements to be adopted by the Commission. The municipalities represented in the group are Anaheim, California; Los Angeles, California; Belmont, Massachusetts; Paxton, Massachusetts; Templeton, Massachusetts; Clarksdale, Mississippi; Greenwood, South Carolina.; Harrisonburg, Virginia; Manassas, Virginia; and Philippi, West Virginia.

Municipal Utilities have direct and substantial interests in this proceeding: (1) several are operating or considering operating systems which may be used, at some point, to provide local exchange services or other telecommunications services; (2) as owners and managers of public rights-of-way, they seek rules which preserve local governments' ability to manage and protect rights-of-way; and (3) as consumers of telecommunications services and as representatives of their residents, Municipal Utilities seek interconnection regulations that will promote competition by providing for readily available interconnection on fair and equitable terms and at reasonable rates.

With respect to specific points in the Commission's Notice of Proposed Rule-making, Municipal Utilities comment as follows:

1. The Commission seeks comment on the types of state/local laws which may be preempted under Section 253(d). Municipal Utilities urge the Commission to consider Section 253(d) preemption issues on a case-by-case basis, and not attempt in this rulemaking to list or categorize such laws. Moreover, pursuant to Section 253(c), the FCC may not preempt actions by a local or state government to control and require compensation for public rights-of-way.

2. The Commission seeks comment on the adoption of explicit national interconnection standards. Municipal Utilities caution that the adoption of stringent national rules may impede ongoing state interconnection initiatives and may stifle technical innovation, thereby impeding local solutions of equal or better methods of interconnection. Therefore, Municipal Utilities urge that the FCC adopt only minimum national standards, which embody an obligation on the part of LECs to provide interconnections on "comparable" terms, and which accord carriers the right to connect at any technically feasible point.

3. Municipal Utilities support the adoption of a reciprocity requirement, mandating that new market entrants be subject to the same obligations as the incumbent carrier. However, the Commission should make an exception for municipalities or municipally-owned utilities which are not authorized under state law or city charter to make their facilities available to incumbent LECs, or which could lose their tax-exempt status if they were to do so.

4. Municipal Utilities support the adoption of a requirement that each unbundled element offered by an incumbent LEC be accompanied by a separately stated price for that service element.

5. The Commission seeks comment on whether Sections 251 and 252 prohibit all forms of price discrimination in pricing interconnection and unbundled element rates. Municipal Utilities submit that nondiscrimination is justifiable where customers are similarly situated, but not where there are differences in the costs of providing services, for example.

6. The Commission is considering whether it should identify a minimum set of network elements that must be unbundled. Municipal Utilities agree that a national, minimum standard is appropriate, but urge that the standard be applied only where a state commission has not already resolved this issue. Moreover, the adoption of a national minimum standard should not preclude subsequent adoption by a state of standards consistent with the Telecommunications Act of 1996.

7. With respect to pricing, Municipal Utilities urge the Commission to defer to state commissions rather than establish a national pricing standard. Such deference is statutorily required by Section 252(d)(1); according deference is more likely to result in the flexibility necessary to determine an appropriate price. Moreover, Municipal Utilities submit states are still permitted under Section 252(d)(1) to use any method of costing, including traditional cost-of-service regulation.

8. Finally, the Commission seeks comment on whether it should propose national standards regarding the access to rights-of-way requirements. Although Municipal Utilities are exempt from these requirements, they caution the Commission against adopting standards regarding issues of capacity, safety, and reliability, which are highly fact-specific matters and should be determined on a case-by-case basis.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC DOCKET NO. 96-98

INITIAL COMMENTS OF MUNICIPAL UTILITIES

Pursuant to the schedule stated in the Commission's April 19, 1996, Notice of Proposed Rulemaking, "Municipal Utilities" hereby submit their Initial Comments in this proceeding. Municipal Utilities is an unaffiliated group of municipalities and publicly-owned electric distribution utilities located across the United States. Municipal Utilities consist of:

Public Utilities Department, Anaheim, California;
Department of Water and Power, Los Angeles, California;
Municipal Light Department, Belmont, Massachusetts;
Paxton Municipal Light Department, Paxton, Massachusetts;
Templeton Municipal Light, Templeton, Massachusetts;
Clarksdale Public Utilities, Clarksdale, Mississippi;
Board of Commissioners of Public Works,
Greenwood, South Carolina.;
Harrisonburg Electric Commission, Harrisonburg, Virginia;
City of Manassas, Virginia; and
City of Philippi, West Virginia.

STATEMENT OF INTEREST

The members of Municipal Utilities are participating in this proceeding because of their direct, substantial and varied interests in the establishment by the FCC of

federal interconnection requirements under Sections 251, 252 and 253, added to the Communications Act of 1934 by the Telecommunications Act of 1996. First, several of the municipalities represented in Municipal Utilities operate or are considering operating systems to provide telecommunications services. For example, the City of Philippi owns and operates a cable television system over which such service is furnished to city residents and, in addition, operates an internal municipal telephone system. Cities engaged in such efforts will be directly affected by the rulemaking to the extent that they use their systems either to enter the local exchange business and serve as a local exchange carrier ("LEC"), lease facilities to other providers, or operate other kinds of telecommunications services, all of which may require interconnection with a LEC.

Second, other Municipal Utilities — such as Manassas and Greenwood — are installing fiber to use in connection with their existing municipal utilities. They are also evaluating the use of the infrastructure being constructed to provide telecommunications services for municipal purposes, with the likelihood that dark fiber would be leased to other telecommunications providers. Similarly, the Anaheim Public Utilities Department has installed a fifty (50) mile fiber optic system to be used for municipal utility purposes (including operation of the utility's SCADA system). Anaheim has entered into a public-private partnership for the management of the system, and is considering the leasing of dark fiber (or other options) to outside providers with the remainder of the system owned and operated by a private company through a public/private partnership.

Third, the Municipal Utilities are vitally interested in this proceeding as consumers of telecommunications services and as representatives of their residents. The ability of telecommunications providers to interconnect expeditiously — and on fair and

equitable terms and at reasonable rates — is central to ensuring the receipt of the competitive benefits promised in the 1996 Act.

Fourth, each of the Municipal Utilities manages and uses public rights-of-way. Section 253(c) added by the 1996 Act preserves, *inter alia*, the authority of local governments to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers ... for use of public rights-of-way ...." While a purpose of this proceeding is to set rules governing the access afforded by LECs to competing telecommunications providers, for the reasons stated *infra* Municipal Utilities urge that in this proceeding the FCC take those actions necessary to preserve the statutory rights of municipalities to "manage the public rights-of-way" or to "require fair and reasonable compensation" for their use.

Finally, members of Municipal Utilities have been participating in electric industry restructuring/deregulation activities ongoing before the Federal Energy Regulatory Commission ("FERC") and, in several instances, before state public utility commissions. On April 24, 1996, the FERC issued its Final Rule in a proceeding designed to implement a national requirement of open access to utility transmission systems.[1] Municipal Utilities assert that FERC's recent (and ongoing) deregulation experience is beneficial and relevant in the instant context. Like local exchange systems, electric bulk power transmission systems are, in general, "essential" facilities operated by utilities having monopoly power. With the passage of the 1996 Telecommunications Act, LEC facilities are now subject to open access

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmission Utilities, et al.*, 75 FERC ¶ 61,080, Order No. 888 (April 24, 1996); 61 Fed. Reg. 21540 (May 10, 1996) (hereinafter "FERC Order No. 888").

requirements and must offer services on an "unbundled" basis. Similarly, with the issuance of FERC's Final Rule the operators of electric transmission systems are subject to similar open access and unbundling obligations. For these reasons, where appropriate, Municipal Utilities will bolster their positions by bringing to the FCC's attention FERC's recent and relevant consideration of open access and unbundling obligations.

COMMENTS

I. RELATIONSHIP BETWEEN SECTION 251 INTERCONNECTION RULES AND PREEMPTION OF STATE AND LOCAL REQUIREMENTS UNDER SECTION 253(d)

POSITION: THE COMMISSION SHOULD CONSIDER IN SEPARATE PROCEEDINGS THE TYPES OF STATE/LOCAL LAWS PREEMPTED UNDER SECTION 253(d) AND SHOULD NOT IN THIS PROCEEDING ATTEMPT TO LIST OR CATEGORIZE SUCH LAWS.[2]

> The Commission notes that the rules it intends to adopt under Section 251
>
> should help to give content and meaning to what state or local requirements the Commission "shall preempt" as barriers to entry under Section 253."

NPRM, ¶ 22. While this statement may be correct as a broad generalization, Municipal Utilities urge the Commission not to use this proceeding as the forum in which to adopt a list or categorization of the types of state/local laws that will be preempted under Section 253. To the contrary, by its terms Section 253(d) envisions preemption only on a case-by-case basis, *i.e.*, "after notice and opportunity for public comment." Given the statutory scheme, a

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[2] For the convenience of the Commission, Municipal Utilities will provide at the outset a one or two sentence summary of their position on an issue at the outset of the Section in which each issue is discussed.

rulemaking proceeding is not a proper vehicle for deciding which state/local requirements shall (or shall not) be preempted.

Moreover, Municipal Utilities also note that the Section 253(d) preemption requirement goes only to state or local requirements that run afoul of Sections 253(a) or 253(b). By contrast, Section 253(c) carves out an exception from any preemption considerations for state and local actions relating to the management of public rights-of-way. In accordance with Section 253(c), the FCC's regulations may not preempt the "authority of a State or local government to manage the public rights-of- way," including requiring "fair and reasonable compensation" from telecommunications providers for use of those rights-of-way. As explained in the statement accompanying the introduction of the language of Section 253(c) on the House floor, Section 253(c) "explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way." 141 Cong. Rec. H 8460 (daily ed. Aug. 4, 1995) (Statement of Cong. Barton). This includes the ability "to distinguish between different telecommunications providers" and to charge a different franchise fee depending on the different burden imposed on the rights-of-way. 141 Cong. Rec. H 8460 (daily ed. Aug. 4, 1995) (Statement of Cong. Stupak).

Thus, the Commission neither need nor can properly issue regulations which impinge upon the authority to control and require compensation for public rights-of-way.[3]

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[3] In light of the statutory language, the Association for Local Telecommunications Service ("ALTS") errs in contending that municipalities cannot require a carrier to undertake obligations or services in order to commence services and that "any fees assessed must be on an equal basis with respect to all providers of local exchange service." ALTS, *Implementing Local Competition Under the Telecommunications Act of 1996: A Proposed Handbook for the FCC* at 31 (March 1996).

The ways in which a local government manages its rights of way, and the type and level of compensation required to use those rights-of-way, are within the local government's purview. A local government's management of its rights-of-way can be reviewed by the FCC only on a case-by-case or individual city basis for a determination as to whether the compensation imposed is "fair and reasonable." If the FCC addresses this matter at all in this rulemaking, Municipal Utilities ask that the Commission make clear that any State or local law related to the control of public rights-of-way, or compensation for the use of public rights-of-way, is outside the scope of the preemption requirement.

II. ADOPTION OF "EXPLICIT NATIONAL RULES" TO IMPLEMENT SECTION 251

POSITION: THE ADOPTION OF EXPLICIT NATIONAL INTERCONNECTION STANDARDS MAY CONFLICT WITH ONGOING STATE EFFORTS TO ADDRESS LOCAL COMPETITION ISSUES AND MAY IMPEDE THE DEVELOPMENT OF NEW TECHNOLOGIES. THEREFORE, TO THE EXTENT FEDERAL INTERCONNECTION RULES ARE PROMULGATED, MUNICIPAL UTILITIES URGE THE ADOPTION OF *MINIMUM* NATIONAL STANDARDS, INCLUDING THE IMPOSITION OF A "COMPARABILITY" OBLIGATION.

The Commission seeks comment (*e.g.*, ¶ 29) on whether it should adopt "explicit national rules" to implement Section 251.[4] In theory, national interconnection standards make sense. Such standards would presumably routinize the establishment of new interconnections, thereby diminishing the likelihood that incumbent LECs would be able to

[4] Similar proposals are also made later in the NPRM with respect to uniform interconnection rules (¶ 51) and nationally-applicable interconnection terms and conditions (¶¶ 61-62). The discussion here is intended to apply to each of these sections of the NPRM.

disregard their interconnection obligations or otherwise delay in completing interconnection agreements.

However, in practice the development and implementation of national standards poses at least two significant and separate problems. First, such standards may undermine ongoing state interconnection initiatives. Second, mandating technical interconnection standards may stifle innovation. In light of these concerns, which are reviewed below, Municipal Utilities urge adoption of no more than the minimum national interconnection standards necessary to achieve comparability.

While promoting national interconnection regulations, the Commission also recognizes that "[s]ome states have been in the forefront of the pro-competitive effort to open local markets to competition ...." NPRM, ¶ 29. States will remain front-and-center with respect to interconnection issues, as Section 252(e) provides for state approval of "any" negotiated or arbitrated interconnection agreement. These arrangements are likely to be as varied as the carriers. For example, LEC networks vary by population density; new carriers may want one-way trunking at high density points, some will want two-way trunking arrangements. Both are appropriate but both are not technically feasible in all cases. Or, for example, connecting at every end office may not make sense in all situations; in some cases tandems may make more sense in areas where the exchanges are large and dense.

Given these concerns, Municipal Utilities urge that state efforts be permitted to continue unimpeded by overly restrictive, conflicting or duplicative national standards. Municipal Utilities are concerned that any effort to enact national interconnection standards not undermine prior, ongoing and likely future state efforts to address local competition issues.

In addition, Municipal Utilities are concerned that uniform national standards may constrain new entrants or incumbent LECs in counter-productive ways. As the Commission suggests, there are geographic differences in local exchange network design and functionality. Some LECs are all analog, some are all digital and most are a mix of facility type. Most new entrants will in fact be designing digital fiber systems. The only technical requirement on their operation should be that all of the systems are able to be interconnected; otherwise innovation may be impeded.[5] Moreover, determining technical standards moves the federal government into the management of the telephone business and may impose added investment to accommodate the standard when there may be better alternatives. A specific national standard would prevent local solutions of equal or better methods of interconnection. The result of a national standard could be similar to the Commission's "Open Network Architecture" experience, in which no new network elements were ever introduced.

Therefore, to the extent the Commission intends to promulgate national standards, Municipal Utilities urge that the FCC adopt only *minimum* national standards and permit state commissions to adopt more stringent requirements where appropriate and consistent with the 1996 Act. As in the case of the electric utility industry, the touchstone of such a national standard should be "comparability." FERC has issued a national rule requiring that all public utilities that own, operate or control interstate transmission must file tariffs that offer others the same transmission services the transmitters provide to themselves,

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[5] For example, some municipalities and publicly-owned utilities have already installed, or are considering installing, "synchronous optical network" (or SONET) rings. Overly specific national standards regarding interconnection requirements might hinder the use of such technology, and should therefore be avoided. Indeed, the *NARUC Local Competition Work Group Summary Report*, NARUC Staff Subcommittee on Communications, Section IV.C at 12 (February 1996) states that "[t]echnical interconnection requirements and standards should generally not discriminate based on the technologies used ...." *Id.*

under comparable terms and conditions.[6] The essence of the comparability obligation imposed under Order No. 888 was explained by FERC in a 1994 order addressing a utility merger:

> Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling public interest considerations, coordination in the public interest can best be secured only if ... utilities offer comparable services.

El Paso Elec. Co. and Central and South West Serv., Inc., 68 FERC ¶ 61,181, at 61,915 (1994).

By the same token, any national interconnection requirements adopted by the FCC should impose an obligation upon incumbent LECs to offer new service providers the ability to interconnect on terms equivalent to those used by the incumbent with respect to adjacent LECs or between the LEC's own facilities. This recommendation is endorsed by NARUC. *Local Competition Work Group Summary Report*, NARUC Staff Subcommittee on Communications, Section IV.C at 12 (February 1996).

With respect to minimum technical standards, minimum standards should accord carriers the right to interconnect at any point as long as it is technically feasible; every point and type should be presumed to be technically feasible unless a LEC can demonstrate that it is not feasible.[7] This recommendation is, again, in accord with the NARUC Report, in which the Work Group proposes that competitors be able to "interconnect at any logical interconnection point, including meet point interconnections." *NARUC Local Competition Work Group Report* at 12.

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[6] FERC Order No. 888.

[7] This point supports the FCC's proposal (¶ 58) that incumbent LECs bear the burden of demonstrating that there is a technical impediment to the provision of an interconnection at a requested point.

Should the Commission nonetheless conclude that it intends to impose more detailed uniform, national interconnection requirements, Municipal Utilities suggest that the FCC consider the basic interconnection requirements adopted by the Connecticut Department of Public Utility Control in a stipulation attached to the DPUC decision in DPUC, Investigation Into The Unbundling of the Southern New England Telephone Company's Local Telecommunications Network - Reopened. Docket No. 94-10-02. For the convenience of the Commission, the stipulation is attached as an Appendix to this pleading. *See* Stipulation Section 2 at 3-4, which states the requirements governing the interconnection of unbundled system elements, including crossconnect terminations, multiplexing, transport to distant central offices, collocation, and the interconnection of new elements.

III. ADOPTION OF RECIPROCITY REQUIREMENT

POSITION: IN GENERAL, MUNICIPAL UTILITIES SUPPORT THE CONCEPT OF RECIPROCAL OBLIGATIONS, BUT THE OBLIGATION SHOULD BE ENFORCED ONLY WHERE THE CARRIER IS AUTHORIZED UNDER STATE LAW AND BY CITY CHARTER TO PROVIDE RECIPROCAL SERVICE.

The FCC seeks comment on whether new market entrants should be subject to the same obligations as those to be imposed on incumbent LECs. NPRM, ¶ 45. In general, Municipal Utilities endorse the concept of reciprocal obligations. Reciprocal interconnection requirements among all carriers will help move toward the goal of an open, interconnected system of communications networks.

However, in crafting a reciprocity requirement, the FCC must recognize that not all municipalities or other public entities that are (or will become) telecommunications

service providers are authorized under state law or city charter to provide third party, reciprocal access to local government-owned facilities. For example, some states follow the so-called "Dillon Rule," which significantly limits a municipality's authority to those powers, that are "expressly granted"; "fairly implied or incident to the powers expressly granted"; or those "essential to the accomplishment of the declared objects and purposes of the corporation ...." 1 Dillon, Law of Municipal Corporations, 448-49 (5th Ed. 1911).

Assuming that they can offer telecommunications services to begin with, municipalities located within states that follow the Dillon Rule may not have authority to make their facilities available to incumbent LECs. Thus, while Municipal Utilities endorse the concept of reciprocity, the FCC should make clear that reciprocal obligations will be enforced only where permissible under state law and city charter.

In addition, reciprocal obligations should not be enforced where to do so would jeopardize a municipality's tax-exempt status. Generally, municipally-owned entities may finance their telecommunications systems through use of tax-exempt debt, but the status of that debt could be jeopardized if such entities are required to make their telecommunications systems available for private use. FERC faced a similar situation in developing a reciprocity requirement for open access electric transmission systems, noting that

> Congress has entrusted the Internal Revenue Service (IRS) with the responsibility for ... determining what uses of the facilities [financed through tax-exempt bonds] are consistent with maintaining tax-exempt status for bonds used to finance such facilities. It is not our purpose to disturb Congress's and the IRS's determinations with respect to tax-exempt financing.

FERC Order No. 888, 61 Fed. Reg. 21614 (1996). FERC went on to note that the IRS is "presently reconsidering its private activity bond regulations[.]" *Id.* However, until such

time as the relevant IRS rules are changed, the FERC concluded that "reciprocal service will not be required if providing such service would jeopardize the tax-exempt status of the transmission customer's ... bonds used to finance such ... facilities." *Id.* For similar reasons, Municipal Utilities urge that the same exception apply here.

IV. SEPARATE PRICING FOR EACH NETWORK ELEMENT

POSITION: MUNICIPAL UTILITIES SUPPORT THE ADOPTION OF A REQUIREMENT THAT EACH UNBUNDLED ELEMENT OFFERED BY AN INCUMBENT LEC BE ACCOMPANIED BY A SEPARATELY STATED PRICE FOR THAT SERVICE ELEMENT.

The Commission seeks comment on its proposed determination that the Section 251(c)(3) requirement that incumbent LECs provide access to network elements "on an unbundled basis" means "that there must be a separate charge for each purchased network element." NPRM, ¶ 86. Municipal Utilities support the Commission's interpretation of the statute and urge adoption of a requirement that each unbundled element offered by an incumbent LEC be accompanied by a separately stated price for that service element. A major purpose of the unbundling obligation embodied in Section 251(c)(3) is to permit competing providers to purchase from the incumbent LEC only those network elements needed to provide service. The ability to choose to purchase only certain specific service elements would obviously be impaired, perhaps fatally, absent an obligation on the part of the incumbent LEC to provide a separate, stated price for each of the service offerings contained on an LEC's "menu."

In a related context, the FERC has directed electric transmission providers to offer "ancillary services" on an unbundled basis, at separately stated rates. According to the

FERC, "ancillary services" are those services necessary to support the transmission of electric power, noting that "[b]asic transmission service without ancillary services may be of little or not value to prospective customers." *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rule-making*, IV FERC Stats. & Regs. ¶ 32,514, at 33,085 (1995) 60 Fed. Reg. 17683 (1995).[8] These "ancillary services" can be considered analogous to the unbundled network elements now before the FCC.

With respect to each ancillary service, FERC directed that the Transmission Provider's tariffs "commit to provide specific ancillary services at specific prices or under specific compensation methods that are clearly defined." *Id.* A similar obligation should be adopted here with respect to each unbundled network element.

V. NON-DISCRIMINATORY PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENT RATES

POSITION: LECs SHOULD NOT BE PERMITTED TO DISCRIMINATE UNFAIRLY IN THE PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENT RATES. THE FCC SHOULD PROHIBIT ONLY DIFFERENTIAL TREATMENT OF SIMILARLY SITUATED PARTIES.

The Commission seeks comment on the meaning of the term "nondiscriminatory" in Sections 251 and 252 of the 1996 Act, asking whether "in choosing the word 'nondiscriminatory,' did Congress intend to prohibit all price discrimination ... measures ...?"

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[8] In the transmission context, "ancillary services" include: (1) scheduling, system control and dispatch; (2) reactive supply and voltage control from generation sources service; (3) regulation and frequency response service; (4) energy imbalance service; (5) operating reserve-spinning reserve service; and (6) operating reserve-supplemental reserve service.

NPRM, ¶ 156. The scope and content of the nondiscrimination standard is important, in that the benefits of open access competition will obviously be far more difficult to obtain if LECs are permitted to discriminate unfairly in the pricing of interconnection and unbundled element services. However, Municipal Utilities do not believe that the FCC should outlaw all forms of price discrimination, in that some may be justifiable where customers are not "similarly situated."

In the context of electric utility rates, price discrimination is prohibited where similarly-situated parties are being treated differently. For example, as explained in *St. Michaels Utilities Commission v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967):

> Discrimination in rates is prohibited by § 205(b) of the Federal Power Act, 16 U.S.C.A. § 824d(b). [footnote omitted].
>
> * * *
>
> Thus, it has been held that differences in rates are justified where they are predicated upon differences in facts — costs of service or otherwise — and where there exists a difference in rates which is attacked as illegally discriminatory, judicial inquiry devolves on the question of whether the record exhibits factual differences to justify classifications among customers and differences among the rates charged them.

Similarly, LECs should be permitted to "discriminate" with respect to rates to the extent that there disparate treatment is "justified" because such treatment is "predicated upon differences in facts — costs of service or otherwise." *Id.* Absent such factual differences, price discrimination should be strictly prohibited.

VI. UNBUNDLED NETWORK ELEMENTS

POSITION: THE COMMISSION SHOULD DEFER TO STATE UNBUNDLING STANDARDS AND PROVIDE A MINIMUM NATIONAL STANDARD ONLY WHERE NECESSARY.

Section 251(c)(3) of the Act requires the LECs

> to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

The Commission suggests (NPRM, ¶ 77) that it should identify a minimum set of network elements that must be unbundled because (as explained in NPRM, ¶ 79) such uniform technical requirements would enhance a carrier's ability to stretch across state lines and LEC boundaries.

Municipal Utilities agree with the tentative conclusion that a minimum set of standards is generally appropriate. However, a national standard should be applied only if a state has not already adopted its own minimum standards that are consistent with the 1996 Act. As Municipal Utilities explained earlier (in the context of minimum interconnection requirements), many state commissions have developed experience in unbundling issues and arrived at resolutions which were agreeable to all parties and suitable to the given needs within the state. For example, following a carrier workshop, Connecticut adopted a statement of the unbundled elements that the LECs and competitive local exchange carriers (or "CLECs") all agree to provide one another. Imposing a new set of standards would unnecessarily require the Connecticut Department of Public Utility Control to reopen and carriers to relitigate standards that are in place and working. Moreover, because different LECs have different system components, a state's determination of the specific network elements that should be unbundled is more likely to be a sounder result than would be reached by applying a national standard.

By contrast, Municipal Utilities encourage the Commission to adopt a national minimum standard applicable in those states in which there are no unbundling requirements. The adoption of national minimums would not preclude states from subsequently adopting separate requirements consistent with the 1996 Act. To aid in the Commission's development of appropriate unbundling standards, we have attached the standards adopted by the Connecticut DPUC as an example of a standard that was mutually agreeable to the LECs and CLECs in that state (*see* Appendix, Stipulation Section 1, at pp. 2-3). The Connecticut standards are the product of a lengthy review of unbundling issues by the DPUC and the parties to the state proceeding. As a consequence, the Connecticut standard may well be more exacting than that adopted in many other states.

Additionally, the minimum standard should be applied only if a competing local exchange carrier requests unbundling. To require implementation of unbundling standards by every LEC would be highly burdensome and economically inefficient if unbundled services were not actually requested.

VII. ADOPTION OF PRICING STANDARDS

POSITION: THE COMMISSION SHOULD DEFER TO STATE COMMISSIONS IN SETTING PRICING STANDARDS AND NEED NOT ADOPT A NATIONAL PRICING METHODOLOGY.

The Commission has sought comment (¶¶ 117-133) on Section 251(c)(2)(D), which requires that incumbent LECs provide interconnection, network elements, and physical collocation of equipment "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with ... the requirements of this section and section 252." Section 252(d)(1) provides that a state commission shall determine a just and reasonable rate

for interconnection based on cost and a reasonable profit. The Commission seeks comment on the interpretation of these provisions, specifically the pricing principles that should be applied by states and the type of enforcement or monitoring mechanism that should be adopted to ensure that carriers comply with the pricing principle.

As with respect to interconnection requirements, Municipal Utilities again urge the Commission to defer to the determinations of state commissions, rather than set national pricing principles. First, Section 252(d)(1) explicitly places responsibility for determining interconnection pricing with *state commissions*. Second, state commissions have more experience in cost analysis for these rate elements than does the FCC; indeed, many states have already adopted pricing standards. Among the states, it is generally correct that rates based on costs have been the rule rather than the exception. States generally use both embedded costs for major service category segregation and incremental costs as the basis for rates, similar to what the Commission did in proceedings which occurred before the FCC implemented price caps. For example, the Connecticut DPUC uses the TSLRIC method.

Third, flexibility in selecting a cost method is a necessity, and rigorous national standards may hinder that flexibility. Today, each state and each company within a state quite often use different cost methods to help set prices. Indeed, there are often different pricing philosophies applied by a single state commission for different local exchange carriers. For example, South Carolina requires embedded costs for GTE to separate major service categories but not for Southern Bell, yet both carriers use the LRIC method to set rates. Further, many companies — and state commissions, such as Connecticut or Montana — require specific cost methods for major carriers, but do not require these methods for entities below the major carrier level. Smaller carriers are often not required to compile cost

data because the exercise can be unduly burdensome. For example, in Montana no specific cost method is applied to a company like Citizens Telephone or a small independent or cooperative. However, U.S. West must apply embedded costs to separate competitive business and use an incremental cost basis for rates. Given these geographic differences and the lack of experience of smaller carriers with respect to costing, an FCC-mandated costing method might well never be effectively applied.

Fourth, a national pricing policy does not necessarily promote competition, which is the central purpose of establishing interconnection requirements. The Commission has cited one of the benefits of a national pricing policy as producing uniformity or "predictability in rates." NPRM, ¶ 119. However, "predictability of rates" does not necessarily promote competition. By dictating the methods for transactions in the market, the Commission could limit competition, not encourage it.

In short, state commissions have more experience and are closer to the LECs in determining what cost method to use to determine whether rates are just, reasonable, and nondiscriminatory. The FCC should not set standards that would unnecessarily infringe upon state ratemaking activities. To implement this recommendation, Municipal Utilities suggest that the Commission make a rate determination only when a state does not act or takes an action that conflicts with the Act. Moreover, tariffs for interconnection, unbundling and collocation that have been approved by state commissions should be presumed just, reasonable and nondiscriminatory until it has been demonstrated that they are not. An appropriate procedure would allow states to first open or re-open cases at the request of a carrier with recourse to the courts and Commission.

On a separate issue, the Commission has tentatively concluded (¶ 123) that the language in Section 252(d)(1) stating that rates "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding)" means that states are precluded from setting rates by use of traditional cost-of-service regulation. We do not agree that the Act dictates a specific costing method.

The Act does not address the issue of how states should determine costs. suggesting that costs can be determined through any appropriate method. The only prohibition in Section 252(d)(1) is that the cost shall be determined without reference to a rate-of-return or other rate-based proceeding. Companies or commissions are therefore not required to open a "rate-of-return or other rate-based proceeding" for a cost determination. We believe that the purpose of this language is to set aside the practice of some states not to examine rates for a single service outside the confines of a specific rate case.

Section 252(d)(1) says nothing about the specific method of costing, or more specifically about requiring the use of LRIC as a costing method. Therefore the cited statutory language does not require a change in the long practice of the Commission and states of using embedded and incremental costs.

Furthermore, practical problems would also arise if LRIC were mandated. As the Commission points out (in ¶ 130), rates must be set above LRIC or TSLRIC to recover common and joint costs that cannot otherwise be included because they relate to the total operation rather than a specific service. The practice of increasing an incremental rate to recover common costs is generally known as "contribution." Typically, states and the FCC have accorded some latitude with respect to how much is recovered by a specific service, or set limits like 15 percent of LRIC costs for essential services or facilities. Of course, if